No. 303. IN THE

APR 10 1900
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

October Term, 1899.

No. 303.

SOUTHERN RAILWAY COMPANY,
Plaintiff,
vs.
POSTAL TELEGRAPH-CABLE COMPANY,
Defendant.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Amendment to Opening Brief for Plaintiff in Error, to be read as if inserted at the foot of page 18 of that Brief.

Pages 19 and 20 of "Opening Brief for Plaintiff in Error" are intended as an assignment of errors and seem to comply with both the letter and spirit of Rule 21 of this honorable court, but it may be that greater elaboration is contemplated by that rule, and we respectfully submit the following as perhaps a more formal and exact compliance therewith.

We ask that this paper may be considered and read as an amendment to our opening brief, and as if inserted at the bottom of page 18 thereof.

ROBERT STILES, Richmond, Va.,
ADDISON L. HOLLADAY, Richmond, Va.,
Counsel for Plaintiff in Error.

17,417.)

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ASSIGNMENT AND SPECIFICATION OF ERRORS.

First.

I. The plaintiff in error respectfully submits that said Circuit Court of Appeals erred in its order of March 31, 1899, in holding and deciding that the order of the Circuit Court dated October 24, 1898, was an interlocutory order, and erred in dismissing the writ of error allowed from said Circuit Court to said Circuit Court of Appeals November 29, 1898. Said Circuit Court of Appeals should have held and decided that said order of October 24, 1898, was a final order.

II. Said Circuit Court of Appeals erred in failing to hold that the order of said Circuit Court, of August 31, 1898, overruling appellant's motion to dismiss the petitions filed by appellee in this cause (because said petitions failed to state facts and grounds sufficient to constitute a cause of action) was erroneous. Said Circuit Court of Appeals should have reversed said Circuit Court and sustained appellant's motion to dismiss all of said petitions, for the reasons written out and numbered from 1 to 16 inclusive, to be found at marginal pages 96 to 102 of the record, which said reasons stated in more condensed form are in substance as follows, namely:

1. Because the petitions filed by the Postal Telegraph-Cable Company fail, and each of them fails, to set out facts and grounds constituting a cause of action.

2. Because said petitions are wholly inconsistent. Appellee grounds its application in its first petition and the amendment thereto upon statutes of North Carolina, supposed by it to be in force, and its last petition invokes the act of Congress approved July 24, 1866, to aid in the construction of telegraph lines.

3 (also paragraph 5 and the first clause of paragraph 6). Because no law exists, now in force on the statute books of North Carolina, by which appellee is authorized to condemn

of way for telegraph purposes along and upon the
of appellant, from, to, and between the several points
n the petitions filed in this proceeding.

cause the Superior Court of Guilford county, from
his cause was removed, had no power or jurisdiction
emn the land or property of appellant, as prayed in
itions, or either of them.

cause appellee failed to allege that the property of
t, upon which it seeks to condemn a right of way for
h purposes, is held as an easement or right of way, as
istinguished from land held by a fee simple title.

cause each and every of said petitions fails to describe
upon which said telegraph right of way is sought to
emned, and fails to allege that appellee surveyed the
its proposed right of way and made a map or survey
designating and locating such right of way, and filed
tes of such location, signed by a majority of the direc-
he company, in the clerk's office of the several coun-
ugh or into which its said telegraph lines are to be
ted.

ecause appellee wholly failed to comply with the re-
nts of section 2012 of the Code of North Carolina of
the filing of its petitions and each of them, and the
of proceedings thereunder to condemn the property
llant.

ecause vital provisions contained in section 1944 of
de, have been repealed by an act of the General As-
of North Carolina, ratified March 6, 1883, which said
k from section 1944 the following words, viz:

t the company has surveyed the line or route of its pro-
ad, and made a map or survey thereof, by which such
line is designated, and that they have located their said
cording to such survey, and filed such certificates of
cation, signed by a majority of the directors of the
y, in the clerk's office of the several counties through
which the said road is to be constructed."

11 (and 12). Because section 2012 of the Code of North Carolina of 1883 requires that the mode and manner of ascertaining just compensation for the property or rights condemned, shall be ascertained as prescribed by section 1946 of said Code, and section 1946 of said Code has been repealed in this particular by chapter 160, Acts 1891 of said State, which struck from section 1946 the following words:

"And in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad."

And added to section 1946 the following proviso:

"Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the said railroad company shall pay the costs of the proceeding and shall not have a judgment for the excess of benefits over the damages."

13. Because appellee failed to serve upon appellant, with the summons in this cause, a map showing how the line or route of the right of way sought to be condemned on the property of appellant is located, and the metes and bounds thereof, and failed to comply with the requirements of section 2 of chapter 396, Acts of 1893, of the General Assembly of North Carolina, or to serve upon appellant any map whatever.

14. Because section 2012 of the Code of North Carolina of 1883 requires that all proceedings for the condemnation of land or any easement therein, for the use of telegraph companies shall be as prescribed in chapter 49 of the Code of North Carolina of 1883 for condemning lands to the use of railroads; and because sections 1944, 1946 and 1952 of said chapter 49 have been amended and changed in vital particulars and repealed so far as applicable to appellant.

15. Because appellee's petitions fail, and each of them fails

clearly and accurately the right of way sought to be
d, its location and the metes and bounds thereof.
ause the laws of North Carolina do not contemplate
have contemplated an indefinite, uncertain, chang-
f way, such as is described in the aforesaid petitions
f them.

SECOND.

in error further submits that the Circuit Court of
red in failing to hold and decide that the order of said
ourt dated September 15, 1898, was erroneous and
reversed:

the sixteen reasons above assigned as error com-
the Circuit Court in its order of August 31, 1898.
use said order of September 15, 1898, was prema-
ered without notice to appellant.
ause neither said order of September 15, 1898, nor
rs, duties, and proceedings of the commissioners
irected to be appointed, as set out in said order,
horized by law.
ause the Circuit Court erred in directing its clerk to
ommissioners to assess damages as therein set
erred in prescribing the oath to be taken by said
ioners.
ause said order erred in directing the mode of pro-
d the principles and rules by which said commis-
hould be governed.
use said order erred in fixing the place for the ses-
id commissioners and how they shall be presided over.
ause said order erred in fixing and prescribing the
to be considered by the commissioners in the as-
of damages and the form and substance of their

THIRD.

f in error further submits that said Circuit Court of
erred in failing to hold that the order of September
by which Samuel L. Trogdon, clerk of said Circuit

Court appointed commissioners to condemn in this cause, was erroneous and should be reversed, because said order was made by said clerk without authority of law and because of the reasons above set out in respect to the order of the Circuit Court dated September 15, 1898.

FOURTH.

Plaintiff in error further submits that the order of said Circuit Court, of October 24, 1898, was erroneous and should have been reversed by said Circuit Court of Appeals, for the following reasons, viz:

1. For all of the reasons above assigned for reversing the orders of said Circuit Court dated August 31, 1898, and September 15, 1898.

2. Because said Circuit Court erred in sustaining appellee's demurrer to appellant's answer.

3. And erred in refusing to allow appellant to introduce evidence in support of the allegations of its answer.

4. And erred in refusing to hear the proofs of appellant and in deciding against appellant without giving it an opportunity to introduce its proofs and be heard.

5. And erred in reinstating said order of the Circuit Court dated September 15, 1898, and in directing the clerk of said Court to fix a day for the meeting of commissioners.

6. And erred in not holding that appellant's answer set up a complete defense.

FIFTH.

Plaintiff in error further submits that said Circuit Court of Appeals erred in failing to hold that the order made by Samuel L. Trogdon, Clerk, dated October 24, 1898, was erroneous and should be reversed for the reasons above assigned in respect to his order of September 19, 1898.

SIXTH.

Plaintiff in error further submits that said Circuit Court of

ed in failing to reverse the order of said Circuit
October 24, 1898, for the following reasons, viz:
se said order of October 24, 1898, deprives appel-
roperty without due process of law, in violation of
tion of the United States.
se said order denies to appellant the equal protec-
aws.
se said order determines, without proof, conditions
the condemnation of appellant's property.
se said order refused to hear the proofs of appel-
quired by section 1945 of the Code of North

se said order refused to permit appellant to intro-
ofs, and denied to appellant an opportunity to be
defence.
se said order without proof determines that appellee
ssession of, use and exercise dominion and control
operty of appellant for the purposes of said tele-
pany, without any further order of said Circuit

se said order, in violation of the Constitution of
States, delegated to the clerk of said court the
lecting and appointing disinterested and competent
to act as commissioners, and authorized said
eside over the meetings of said commissioners.
se said order delegated to said clerk powers vested
uit Court of the United States and in said Circuit

Respectfully submitted,

ROBERT STILES,
ADDISON L. HOLLADAY,
Counsel for Plaintiff in Error.

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IN THE

upreme Court of the United States.

October Term, 1900.

No. 64.

SOUTHERN RAILWAY COMPANY,

PLAINTIFF IN ERROR,

VS.

POSTAL TELEGRAPH-CABLE COMPANY,

DEFENDANT IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Closing Brief for Plaintiff in Error.

STATEMENT OF CASE.

In our opening brief for the Southern Railway Company, e sole plaintiff in error, we said:

'On the 30th of March, 1899, the Circuit Court of Appeals ed an opinion, holding that no appealable order had been ade by the Circuit Court, and on March 31, 1899, made an der dismissing the writ of error for want of jurisdiction.

The cause was then brought by writ of error to this court, and proper bond having been given, the writ of error operated as a supersedeas; but, upon application of the appellee, this court, in October, 1899, vacated the supersedeas.

"The court, however, refused to dismiss the writ of error, after full argument on the point, and we take that action to be a final adjudication that THE ORDER OF OCTOBER 24, 1898, WAS A FINAL ORDER."

Counsel for the Postal Telegraph-Cable Company, the sole defendant in error, has devoted a large part of his reply brief, filed at the October term 1900, to a repetition of his motion made and denied at the last term, to dismiss the writ of error in this cause, the grounds for his present motion being stated at pp. 12, 22 and 34 of said brief, but nothing new seems to have been added touching the finality of the order to which the writ of error was allowed.

I.

Character of Order of October 24, 1898.

The character of the order of October 24, 1898, was discussed at great length in elaborate printed briefs filed at the last term, and this court then took the matter under advisement for two weeks, and after mature consideration, made an order by which it expressly denied the motion to dismiss and in the same order vacated the supersedeas. No opinion was filed, but the court having had before it the two motions of the defendant in error, (1) to dismiss the writ of error, and (2) if that motion was not sustained, then to vacate the supersedeas, and the opinion of Honorable Charles H. Simonton, in the trial court, refusing to allow the writ of error (which was subsequently allowed by Honorable Nathan Goff), and the elaborate opinion of the Circuit Court of Appeals holding that there was no final judgment from which a writ of error would lie, as well as the printed briefs of counsel for the defendant in error, all of which brought out the motions at issue in the clearest and sharpest

r, and the court having carefully discriminated between
o motions, by vacating the supersedeas and refusing to
s the writ of error, the logical conclusion seems to be
e court considered the order of October 24, 1898, appeal-
ıd the cause one which should be heard upon its merits.
erefore deem it unnecessary, if not improper, to further
s the appealability of the order in question.

owever, we are mistaken in this, we respectfully refer to
inted brief of fifty pages filed early in the October term,
alling special attention to pages 10 and 11, upon which
e found a detailed analysis of the order of October 24,
ınd what that order really settled; pages 17 to 20 inclu-
ıd also pages 39 and 40, in which the jurisdiction of this
is discussed, as dependent upon the final or appealable
ter of said order; and pages 40 to 42, which are devoted
scussion of four North Carolina cases, to-wit: *Telegraph*
Railroad Co., 83 N. C., 426; *Commissioners* v. *Cook county*,
C., 18; *Railroad Co.* v. *Warren*, 92 N. C., 620; *Hendricks*
lroad Co., 98 N. C., 431. These cases, in which the order
ıting commissioners was held not to be a final order under
ıtutes and decisions of North Carolina, were cited by the
of Appeals in its opinion as like cases to the case at bar
e think they are clearly discriminated from the case at
pon said pages 40 to 42 of our brief last referred to.

l lastly, we respectfully call special attention to pages
of our said brief, which pages are devoted to a critical
is and discussion of the case of *Luxton* v. *North River*
Co., 147 U. S. 337, cited by the Circuit Court of Appeals
opinion in the case at bar, and mainly relied on by the
lant in error in support of the position that, an order
ıting commissioners in a condemnation proceeding is not
ı the nature of things cannot be a final or appealable

With some degree of modest confidence we submit
y our discussion of that case it is demonstrated that
ı v. *North River Bridge Co.*, so far from being an authority
s position, really sustains the position for which we con-

tend, to-wit: that the appealable character of an order appointing commissioners in a condemnation proceeding depends upon its real character and effect and that this depends upon the terms, character and effect of the eminent domain statute under which such commissioners are appointed. This is also, in terms, the opinion and decision of this honorable court in *Luxton* v. *North River Bridge Co.*, wherein, at the top of page 338, after a brief discussion of the facts, the court says:

> "At the threshold of the case lies the inquiry whether the order of the Circuit Court appointing commissioners to assess damages for the taking by the petitioner of the respondent's land, is a final judgement upon which a writ of error will lie. This depends upon the terms and effect of the act of incorporation of the petitioner by the Congress of the United States, taken in connection with the general railroad law of the State of New Jersey."

As heretofore said by us, we respectfully submit that—

The Circuit Court by its order of October 24, 1898:

1. Determined that North Carolina statutes are in force under which a telegraph company may condemn a right of way for its purposes upon the property of a railroad.

2. Prohibited testimony showing the value for telegraph purposes of the property to be condemned.

3. Determined that the condemned right of way for telegraph purposes may be unfixed, shifting and changing as to location.

4. Determined that the entire condemnation may be had in one proceeding upon a strip of land, much of which is held in fee-simple (by the railway company), belonging to a single owner and extending through twelve different counties a distance of nearly two hundred and fifty miles.

5. Determined upon demurrer that every defense set up in the answer of the railway company is without merit, even though it were proved by conclusive evidence.

ısed to hear proof as required by section 1945 of the North Carolina.
ermined without proof conditions precedent to con-
on under the North Carolina statutes.
egated to its Clerk the power of selecting and ap-
commissioners to assess damages and authorized
to preside over such commissioners.
egated to its Clerk powers vested in the court and
urt only.
termined that the telegraph company may condemn
session of, construct its lines upon, exercise domin-
and use the land of the railway company before
y of any further order by the court.

II.

ne Cause Prematurely Removed from the State Court to the Federal Court?

ge 22 of his reply brief, counsel for the Telegraph
y contends that this cause was prematurely removed
State Court to the Federal Court, and that the latter
no jurisdiction.
mons was issued and served, requiring the Southern
Company to appear before the clerk of the Superior
Guilford county, North Carolina, on the 22d day of
98, and answer. Had the Railway Company failed to
aid Superior Court, which was in session on that day,
ave appointed three commissioners to condemn the
of the Railway Company, and upon the filing of their
ing the amount of compensation, the Telegraph Com-
ld have paid the same into court, taken possession of
perty, and proceeded to construct its telegraph line
But on June 22, 1898, the Railway Company entered
al appearance for that purpose, filed a petition and
the removal of the cause from the State Court to the
Court of the United States for the Western District of
arolina, and moved the State Court to enter the proper

der of removal, which the latter refused to do, and made an der denying the application, and giving the Railway Company twenty days in which to file its answer. The petition led by the Telegraph Company did not set out the value of he amount in controversy, but the petition for removal stated hat the matter in controversy exceeded, exclusive of interest nd costs, the sum or value of $2,000, and contained all other roper statements required by the statute governing removals. The State Court based its refusal to remove upon its opinion hat the amount in controversy was not shown to exceed $2,000. The petition for removal, when presented to the State Court, became a part of the record of that court, and it appeared on he face of the record—*i. e.*, the pleadings and proceedings down to and including the petition to remove and the removal bond—that the Railway Company had a right to remove the cause to a Federal Court; and, as the record then stood, the Federal Court, not the State Court, was clothed with jurisdiction to determine the question of fact thus presented, viz: the amount involved. See *Burlington* v. *Dunn*, 122 U. S., 515; *Crehore* v. *O. & M. Ry. Co.*, 131 U. S., 240; *Kansas City Ry.* v. *Daughtry*, 138 U. S., 298.

A transcript of the record having been filed in the Circuit Court of the United States for the Eastern District of Virginia, the Telegraph Company moved that court to remand the cause to the State Court, upon the grounds (1) that the amount involved was below the jurisdictional limit, and (2) that even if sufficient, yet the cause had been prematurely removed; upon the hearing of which motions the Railway Company filed four affidavits showing that more than the jurisdictional amount was involved, and, no affidavits having been filed by the Telegraph Company, the Circuit Court refused to remand.

The proceeding in the Superior Court of Guilford county, N. C., was, at the very outset, as shown by the petition of the Telegraph Company, INTER PARTIES AND ADVERSE. See Code of North Carolina, 1883, Sections 2007–2013.

151 U. S., 673.

Subject: Removal of cause to Federal Court.

in v. *Baltimore & Ohio Railroad*, 151 U. S., 686. Mr. ray, in delivering the unanimous opinion of the d:

defendant's petition for the removal of the case ircuit Court of the United States was not filed at the ıer in March or in April. But it was afterwards ıd heard by the State Court before the end of the m. It was therefore filed at or before the time at e defendant was required by the laws of the State to plead to the merits of the case, but after the time at was required to plead to the jurisdiction of the court, tement of the writ.

his a compliance with the provision of the act of Con- 1887, which defines the time of filing a petition for in the State Court? We are of opinion that it was ıore than one reason. This provision allows the peti- removal to be filed at or before the time when the t is required by the local law or rule of court 'to r plead to the declaration or complaint.' These ake no distinction between different kinds of answers and all pleas or answers of the defendant, whether of law by demurrer, or in matter of fact, either by plea to the jurisdiction of the court or in suspension ment of the particular suit, or by plea in bar of the ht of action, are said, in the standard books on plead- ppose or answer' the declaration or complaint which ıdant is summoned to meet. Stephen on Pleading ed.), 60, 62, 63, 70, 71, 239; Lawes on Pleading, 36. iciary Act of September 24, 1789, c. 20, § 12, required ı for removal of a case from a State Court into the Court of the United States to be filed by the defendant ıme of entering his appearance in such State Court.'

1 Stat., 79. The recent acts of Congress have tended more and more to contract the jurisdiction of the courts of the United States, which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earliest statute. *Pullman Car Co.* v. *Speck*, 113 U. S. 84; *Smith* v. *Lyon*, 133 U. S., 315, 320; *In re Pennsylvania Co.*, 137 U. S., 451, 454; *Fisk* v. *Henarie*, 142 U. S., 459, 467; *Shaw* v. *Quincy Mining Co.*, 145 U. S., 444, 449.

"Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the State Court as soon as the defendant was required to make any defense whatever in that court, **so that if the case should be removed, the validity of any and all of his defences should be tried and determined in the Circuit Court of the United States.**" * * *

---

91 U. S., 367.

Subject: Removal of cause to Federal Court.

In *Kohl* v. *United States*, 91 U. S., 367, this court said:

"The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the Government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right. It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its

nature at least *quasi* judicial. Certainly no other mode than a judicial trial has been provided."

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92 U. S., 10.

Subject: Removal of cause to Federal Court.

In *Gaines* v. *Fuentes*, 92 U. S., 10, the Court, in considering the act of March 2, 1867, said:

* * * "This Act covered every possible case involving controversies between citizens of the State where the suit was brought and citizens of other States, if the matter in dispute, exclusive of costs, exceeded the sum of $500. It mattered not whether the suit was brought in a State Court of limited or general jurisdiction. The only test was, did it involve a controversy between the citizens of the State and citizens of other States? and did the matter in dispute exceed a specified amount? And a controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of the litigation, and was presented by the pleadings for judicial determination."

---

124 U. S., 197.

Subject: Removal of cause to Federal Court.

In *Searl* v. *School District*, 124 U. S., 199, the action of the Circuit Court in remanding a proceeding to condemn property to the State Court was reversed, and the cause remanded by the Supreme Court of the United States to the Circuit Court of the United States with directions to proceed therein, Mr. Justice Matthews, in delivering the unanimous opinion of the court, said:

* * * "In *Boom Co.* v. *Patterson*, 98 U. S., 403, 406, speaking of a judicial proceeding to appropriate private property to a public use and to fix the compensation therefor, it was said: 'If that inquiry take the form of a proceeding be-

fore the courts, between parties, the owners of the land on one side, and the company seeking the appropriation on the other, there is a controversy which is subject to the ordinary incidents of a civil suit;' and among such incidents, it was held in that case was the right, on the ground of citizenship, to remove it from a State to a Federal tribunal for hearing and determination. The same point was ruled in the *Pacific Railroad Removal Cases*, 115 U. S., 1, 18. In *Gaines* v. *Fuentes*, 92 U. S., 10, it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties capable of pecuniary estimation is the subject of litigation, and is presented by pleadings for judicial determination.

"The fact that the Colorado statute provides for the ascertainment of damages by a commission of three freeholders, unless at the hearing a defendant shall demand a jury, does not make the proceeding from its commencement any the less a suit at law within the meaning of the Constitution and acts of Congress and the previous decisions of this court. The appointment of the commissioners is not, as in the case of *Boom Co.* v. *Patterson* and the *Pacific Railroad Removal Cases*, a step taken by the party seeking to make the appropriation *ex parte* and antecedent to the actual commencement of the adversary proceeding *inter partes*, which constitutes a suit in which the controversy takes on the form of a judicial proceeding. Because, under the Colorado law, the appointment of the commissioners is a step in the suit after the filing of the petition and the service of summons upon the defendant. It is an adversary judicial proceeding from the beginning. The appointment of commissioners to ascertain the compensation is only one of the modes by which it is to be determined. The proceeding is, therefore, a suit at law from the time of the filing of the petition and the service of process upon the defendant.

"The precise question involved here was passed upon and satisfactorily dealt with by the Circuit Judge in the Circuit Court for the District of Colorado in the case of the *Colorado*

Midland Railway Co. v. *Jones*, 29 Fed. Rep., 193, and by the Circuit Court for the Western District of Michigan by the District Judge, Brown, in the case of *The Mineral Range Railroad Co.* v. *The Detroit and Lake Superior Copper Co.*, 25 Fed. Rep., 515.

"The case was properly removed, and the motion to remand erroneously granted. The judgment of the Circuit Court thereon is accordingly.

"*Reversed, and the cause remanded to the Circuit Court with directions to proceed therein.*"

Counsel for the defendant in error places great reliance upon the case of *Baltimore & Ohio Railroad* v. *Pittsburgh, &c., Railroad*, 17 W. Va., 812, and copies nearly a page from that opinion for the purpose, apparently, of showing that condemnation cases cannot be removed from State Courts to Federal Courts. That case and the doctrine there announced have been carefully considered by this court in a recent case, to-wit:

151 U. S., 673.

Subject: Removal of cause to Federal Court.

In *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S., 683, Mr. Justice Gray, in delivering the opinion of the Court, said:

"In *Baltimore & Ohio Railroad* v. *Pittsburg, &c., Railroad* (1881), 17 W. Va., 812, a petition of the Baltimore & Ohio Railroad Company for the removal into the Circuit Court of the United States of a proceeding for the taking of some of its land for the railroad of a West Virginia corporation, was denied by the courts of West Virginia, upon the ground that the Federal Courts could under no circumstances have jurisdiction of such cases. (17 W. Va., 866–867.) That decision is inconsistent with the decisions of this Court. *Boom Co.* v. *Patterson*, 98 U. S., 403, 407; *Union Pacific Railway* v. *Kansas City*, 115 U. S., 1, 19; *Searl* v. *School District*, 124 U. S., 197." * * * * *

Counsel for the defendant in error will perhaps attempt to differentiate his position from that condemned and pronounced unsound by this honorable court in the extract just given from 151 U. S. He will probably insist that he does not contend that no condemnation case can ever be legally removed from State to Federal Courts, but only that such cases cannot legally be thus removed until they arrive at a certain stage of development, *i. e.*, after the condemnation of the property in question has been determined upon and nothing remains to be done but to fix the amount of compensation. We submit that his position, even thus limited, is unsound; that he has misunderstood the language employed by the courts and misapprehended the real force and meaning of the authorities. While it is true that the United States will not, in any of its departments, interfere with the exercise by a State of its sovereign right of Eminent Domain, in so far as the question of the existence of that right is concerned; yet, where the State has itself attached conditions to the exercise of this right and the owner of the property sought to be appropriated has been summoned into court, and the question is whether these conditions have been fulfilled, then there is "a suit" which is properly a matter of judicial cognizance by the State Court and capable of being legally removed by the defendant into the United States Court; or, as better put in the second paragraph of the syllabus in *Boom Co.* v. *Patterson*, 98 U. S., 403:

"The exercise by the State of its sovereign right of Eminent Domain, cannot be interfered with by the United States; but when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed, is a proper matter for judicial cognizance."

There could scarcely be a more clear cut, legal statement of the character of the proceeding in the case at bar, both upon the defendant's application to remove the cause from the State to the Federal Court, and the plaintiff's motion to remand it.

Under the general head of the Premature Removal of the cause from the State to the Federal Court, counsel for the

defendant in error, upon pages 33–34 of his brief, refers to and cites authorities construing that peculiar feature of the statute law of North Carolina, whereby the term "Court" is, under certain circumstances, to be understood as signifying the "Clerk" thereof;—with regard to which, we remark that:

1st. We fail to perceive the logical relevancy, or bearing of this interpolation.

2nd. It seems clear, from the express phraseology of the North Carolina statute and from the authorities, that the Clerk has no judicial powers, when "issues both of law and fact or issues of fact only" are raised in the pleadings, but his duty under such circumstances is to transfer the cause to the Superior Court docket to be tried at the next ensuing term. See *Clark's Code of Civil Procedure*, Sec. 256, and *Jones* v. *Hemphill*, 77 N. C., 42, and *McAden* v. *Banister*, 63 N. C., 478.

It need scarcely be remarked that the matter embodied in the petition of the Telegraph Company, to-wit: the appointment of commissioners to condemn a right of way for its purposes upon the property of the defendant Railway Company and the answer thereto of the Railway Company *involved numerous issues* both of law and *of fact*, as clearly appears from the extracts from said answer hereinabove given, which answer was filed as soon as permission was given by the court. And in this connection we remark that, had the application of the Telegraph Company for the appointment of commissioners been made to the Clerk of the Superior Court of Guilford county, and had the cause remained in the State Court, it would have been the duty of the Clerk of that court (under section 116 of the Code of North Carolina), immediately upon the filing of the answer of the Railway Company, to transfer the issues of fact raised by said answer to the Superior Court for trial at its next succeeding term, but,

3rd. In the case at bar the Telegraph Company did not even attempt to apply to the Clerk of the State Court to appoint commissioners. On the contrary the Telegraph Company *filed*

its petition before the Superior Court of Guilford county in open court.

4th. When subsequently, the Judge of the Honorable Circuit Court of the United States directed the clerk of that court to appoint the commissioners, said Clerk of said Federal Court did not follow the provisions of the court's order in the premises, which directed him to appoint "three disinterested and competent freeholders resident in this district," (record, marginal page 43); but, in his order making said appointment, said clerk recites the court's order as commanding him "to summon three disinterested freeholders as commissioners" (marginal page 44); and, in actually making said appointment, said clerk merely recites that—"I have this day appointed as commissioners in said cause A. M. Scales, John M. Walker and J. Addison Hodgin, residents of the county of Guilford, N. C."

Thus, in his recital of the court's order, said clerk makes no reference to the required qualification of *competency;* and, in actually making the appointments, takes no note of either of the required qualifications of *competency*, or *absence of interest*, or even of the parties being *freeholders*, but recites only that said parties appointed by him are "residents of Guilford county."

5th. We respectfully submit, that the peculiar feature of the North Carolina statute law under discussion had no legal or proper application to the proceeding in the case at bar, after its removal to the Circuit Court of the United States; because there altogether inappropriate, inconsistent with the terms, and calculated to defeat the purpose and impair the effect of the legislation of Congress, whereby the judicial power of the United States is committed to its several COURTS.

Without deeming the reference necessary, but merely for the

rpose of illustrating several of the suggestions above made, add the following *extracts* from sundry sections of the Code North Carolina (1883), and from decisions of the Supreme urt of that State.

The Code of North Carolina, edition of 1883, provides as llows:

'Sec. 102. *Office of Probate Judge Abolished.*

'The office or place of Probate Judge is abolished, and the duties hereto- e pertaining to clerks of the superior court as judges of probate, shall be rformed by the clerks of the superior court as clerks of said court, and matters pending before said judges of probate shall be deemed trans- red to the clerks of the superior court."

'Sec. 103. *Clerks of the Superior Court; their jurisdiction.* C. C. P., ss. 417, 8.

'The clerks of the superior court have jurisdiction:

* * * * * * *

2) To take proof of wills and grant letters testamentary and of adminis- ation.

3) To revoke letters testamentary and of administration.

* * * * * * *

7) To exercise jurisdiction conferred on them in every other case as pre- ribed by law.

"Sec. 108. *Enumeration of powers.* C. C. P., s. 422.

"Every clerk has power:

* * * * * * *

(7) To preserve order in his court and to punish contempts;

* * * * * * *

(9) To open, vacate, modify, set aside, or enter as of a former time, de- ees or orders of his court, in the same manner as courts of general juris- ction;

(10) To award costs and disbursements as prescribed by law, to be paid ersonally, or out of the estate or fund, in any proceeding before him."

"Sec. 112. *Records to be kept by clerk.* C. C. P., s. 427.

"The following books must be kept by each clerk:

* * * * * * *

(3) A record of all orders and decrees passed in his office, which he is re- uired to make in writing, and not required to be recorded in some other ook:

* * * * * * *

Sec. 116. Issues of fact joined before the clerk to be transferred to the superior court; appeals shall lie to judge. C. C. P., ss. 490, 491, 492. 1873-'4, c. 34, s. 3. 1876-'7, c. 241, s. 5.

"All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding term of said court; and appeals shall lie to the judge of the superior court having jurisdiction, either in term time or vacation, from judgments of the clerk of the superior court in all matters of law. In case of such transfer or appeal, neither party shall be required to give an undertaking for costs; and the clerk shall transmit, on such transfer or appeal, to the superior court, or to the judge thereof, the pleadings or other papers, on which the issues of fact or of law arise. An appeal must be taken within twenty days after the entry of the order or judgment of the clerk. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof."

Sec. 391. *Issues defined; different kinds of issues. C. C. P., s.* 219.

"Issues arise upon the pleadings, when a material fact or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds:

(1) Of law; and

(2) Of fact.

Sec. 393. *Issue of fact. C. C. P., s.* 221.

"An issue of fact arises—

(1) Upon a material allegation in the complaint controverted by the answer; or

(2) Upon new matter in the answer, controverted by the reply; or,

(3) Upon new matter in the reply, except an issue of law is joined thereon."

Sec. 397. *Trial defined. C. C. P., s.* 223.

"A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

98. *Issues; how tried. C. C. P., s.* 224.

ssue of law must be tried by the judge or court, unless it be referred.
e of fact must be tried by a jury, unless a trial by jury be waived, or
nce be ordered."

99. *Other issues to be tried by the court or judge. C. C. P., s.* 225.

ry other issue is triable by the court, or the judge thereof, who, how-
ay order the whole issue, or any specific question of fact involved
to be tried by a jury, or may refer it. And when a compulsory
e is ordered either party has the right to have the issues of fact
a jury."

ones v. *Hemphill*, 77 N. C., 42, the third paragraph of the
ns is as follows:

In a special proceeding, if the answer of the defendant
an issue of fact, the clerk should transfe a copy of the
ngs to the civil issue docket for trial at term time; if it
issues of law and fact, a similar transfer should be made,
ues of fact to be tried before a jury and the issues of
be eliminated by the judge and decided by him at the
ime."

Powell v. *Morisey*, 98 N. C., 426, the third paragraph of
labus is as follows:

Where an issue of fact is raised before the clerk, no
ent can be rendered, but the case must be transferred
court for trial. The Code, sec. 116. It is only upon
ons of law where the clerk must give judgment, from
an appeal may be taken."

do not propose, under this head, to enter again upon
eral discussion of the action of the United States Cir-
ourt, or of the clerk of that court, in the regard last
oned, for the purpose of showing error in the proceed-
full discussion of these matters, in this aspect, having
mbodied in our opening brief for the plaintiff in error, at
-77; but we remark that the above extracts from North
na statutes and decisions seem to demonstrate the inappli-
y, inappropriateness and illegality of the importation
court of the United States of the North Carolina practice

ith regard to the conduct of the proceedings by the clerk, nd we submit also that the orders of September 15 and October 4, 1898, to which we objected upon grounds so radical and so aried, have this further sin to atone for, viz: that *they robbed s of our right*, under the Constitution and Statutes of the Jnited States, *to a trial by jury at the bar of the court*. This oint, however, will be presently discussed under the head of rial by jury.

III.

Is the Amount Involved Less than the Jurisdictional Limit of the Circuit Court?

When the Circuit Court removed the cause from the State Court, said Circuit Court had before it simply the affidavit of F. H. Busbee to the removal petition which stated in customary form that "the matter in controversy therein exceeds, exclusive of interest and costs, the sum or value of $2,000.00." The State Court had refused to grant the removal under this petition, but the authorities are clear that the Federal Court had the exclusive right to determine whether the jurisdictional amount was involved.

When said Circuit Court refused to remand the cause to the State Court, it had before it—

1. Petition for removal, with affidavit thereto, of F. H. Busbee (record, marginal pp. 8–9).
2. Affidavit of E. T. D. Myers (marginal p. 16).
3. Affidavit of T. M. R. Talcott (marginal pp. 16–17).
4. Affidavit of Frank C. Gannon (marginal pp. 17–18).
5. Affidavit of R. M. Sully (marginal pp. 18–20).

These affidavits conclusively demonstrate that the amount involved largely exceeded the jurisdictional limit of that court, to-wit: $2,000, exclusive of interest and costs. We call special attention to the affidavit of T. M. R. Talcott, marginal p. 16,

of R. M. Sully, marginal pp. 18–20. These gentle-
accomplished railroad experts, and their affidavits
easons given for their conclusions are so clear, logical
nected that extracts therefrom would fail to convey
force.

ition to the affidavits listed above, this honorable court
before it the answer of the plaintiff in error, marginal
4, with the affidavit thereto of C. H. Hudson, its chief
, which, near the bottom of marginal p. 61, states in
e that the damage to the property of the Railway
y from the condemnation sought by the Telegraph
y would amount to an aggregate of not less than
To this answer the defendant in error demurred.
er of October 24, 1898, record, marginal p. 70, and
xceptions No. 3, marginal p. 74.)

**elegraph Company having, on its motion to remand,
ed no affidavits in rebuttal of the above listed affi-
led by the Railway Company, and having, in the
of the cause, demurred to the answer of the Rail-
mpany, which averred that the aggregate damage
tter will exceed $60,000, and the trial court having,
stance of the Telegraph Company, refused to per-
Railway Company to introduce any testimony
r in support of the averments of fact contained in
er, we respectfully submit that, ON THIS APPEAL
S THE RECORD NOW STANDS, this court will
amount involved as exceeding $60,000.**

boots it that the Telegraph Company's petition form-
s that "said poles will be so erected, and said tele-
ine so constructed and maintained as not to obstruct or
he usual travel and business of said railroad company,
ny way interfere with the operation of said company,
any telegraph line now constructed on said right of
See record, marginal page 5.

Railway Company states in substance in its answer
e bottom of marginal page 57 of the record) * "that

rge portion of the lands of this defendant along and upon
ch the petitioning telegraph company seeks to condemn
right of way for its purposes in the various counties speci-
in its said petition, is held by this defendant in fee simple
he said land having been acquired by purchase from the
ginal owners under deeds conveying to this defendant fee
ple title to the same—a title as complete and absolute as
t of any citizen who has purchased land and taken a deed
the same in fee simple."

And the first clause of paragraph 7 of said answer filed by
Railway Company (record, marginal page 58), is as follows:

'7. The complainant's petition states that "said poles will
so erected and said telegraph line so constructed and main-
ned, as not to obstruct the usual travel and business of said
lroad company, nor in any way interfere with the operation
said company, nor with any telegraph line now constructed
said right of way;" but this defendant denies the truth of
d statement, and declares that said poles erected and said
egraph line constructed and maintained, as set out in detail
said petition, will obstruct and hinder the usual travel and
siness of this defendant, and will interfere with the opera-
n of this defendant's railroad company, and with the tele-
aph line now constructed upon this defendant's property;
d this defendant further declares that it will not be possible
construct and maintain a line of telegraph upon its property,
set out in said petition, in such a manner as not to obstruct
hinder the usual travel upon defendant's said railroad.

And paragraph 11 of said answer (marginal p. 60), is as fol-
ws, viz:

"11. Further answering, defendant denies 'that the right
way' of this defendant is 'about 100 feet wide, and it ex-
nds about 50 feet from a line along the centre between the
ils of said main track;' on the contrary, defendant states
at the strip of land along which its tracks are laid and its
ains are run varies greatly in width at different points along

ıd that, at sundry points along said line included in
ed by the condemnation proceedings of the plaintiff,
ss than 100 feet in width, indeed, is so narrow that
telegraph line thereupon in the manner set out in
on would be impracticable, or, at least would grossly
e safe operation of defendant's railroad and grossly
r hinder the usual travel thereupon."

e first clause of paragraph 12 (bottom of marginal
s follows, viz:

Said petition of the telegraph company contains the
allegations: 'Said telegraph lines when con-
vill in no way damage the property of said railroad
nor impair nor diminish the value of said right of
ailroad purposes, but that the same will be beneficial
ailroad co., and its patrons.' Defendant is advised
llegation is rather a conclusion of law than a state-
act; but, whichever it may be, defendant meets said
with a denial of its truth as a statement of facts,
soundness as a conclusion of law. And, in further
to said allegations, which defendant is advised is
rd as a basis upon which to claim or to argue that
nore than 'nominal damages' should be allowed to
dant, as compensation to it for the condemnation of
rty by the petitioning Telegraph Co., for its pur-
is defendant says that, not only would 'nominal
not be to this defendant that 'just compensation,'
supreme law of the land guarantees to the citizen
property is taken for public use, but, such 'just com-
' for such condemnation of the property of this
as is contemplated and sought in the said petition
intiff, would amount to a very large sum of money—
ch larger, indeed almost incalculably larger, than the
onal limit of this court; indeed, defendant states that
ges to its property from the condemnation sought in
ion of the Telegraph Company, would amount not

less to a sum of $300 per mile of such right of way, or an aggregate for the entire 200 miles of not less than ($60,000) sixty thousand dollars."

These averments of fact were well pleaded. To this answer, to these averments of fact, the Telegraph Company demurred. Its demurrer admitted the facts as fully and completely as if they had been proven by the clearest and most conclusive testimony; but, when the court announced that it sustained the demurrer, counsel for the Railway Company appreciating the gravity of the situation, and being ready to prove the averments of fact contained in its answer and wishing to avoid any technical slip in regard to pleading—*i. e.*, to the effect of the plaintiff's demurrer and the order sustaining it—asked leave to introduce testimony sustaining the averments contained in the answer of the Railway Company. The court, however, refused to permit the Railway Company to introduce any testimony. All of this appears in the order of October 24, 1898 (see order, record, marginal page 70, and bill of exceptions No. 3, marginal p. 74), the first paragraph of which is as follows:

"This day came the defendant Railway Company and by leave of court filed its answer to the complainant's written notice and motion, to which said answer the plaintiff telegraph company demurred, and after argument of counsel, and the matter being duly considered by the court, said demurrer is hereby sustained, and the defendant having asked leave to introduce testimony sustaining the averments of its answer, which leave was refused by the court."

The position taken by the Telegraph Company seems to be that, although it has *admitted* upon the face of the record that, under the circumstances of this case as set out in the answer of the Railway Company, the latter will *as matter of fact* be actually damaged to the extent of not less than $60,000.00 by the proposed condemnation; yet the Telegraph Company asks

this court to hold, *as matter of law*, that the damage to the Railway Company will be merely nominal.

The only basis and foundation vouched by the defendant in error for this remarkable position is what he alleges to be the doctrine of this honorable court announced in *Chicago, Burlington, &c., R. R.* v. *Chicago*, 166 U. S., 226, &c., and certain decisions by certain State Courts, holding that when a telegraph company, in cases of a certain character, condemns the right of way of a railroad for its purposes, the damages to the railroad may be only "*nominal.*"

Whether or not these decisions are, in the general or under any circumstances, authority for the proposition deduced from them by the defendant in error, we do not care now to discuss, but we do submit that they can have no application to the case at bar; that this honorable court will never apply the alleged doctrine of these authorities, upon the preliminary question of the right of removal of a cause from a State to a Federal Court, as settling, adversely to the jurisdiction of the Federal Court, the question of the amount involved in the controversy.

More particularly, the alleged doctrine of these authorities will not be applied in a case where, as in the case at bar, the telegraph company, resisting the jurisdiction of the Federal Court, has admitted upon the face of the record—that a large portion of the right of way of the railway company, sought to be condemned by the telegraph company for its purposes, is held by purchase under fee simple deeds (record, marginal page 57); that such right of way varies greatly in width, at sundry points covered by the condemnation proceedings, being so narrow that to erect a telegraph line thereupon would be impracticable, or, at least, would grossly imperil the safe operation of the defendant's railroad, and grossly obstruct or hinder the usual travel thereupon (m. p. 60); that "just compensation" for the property sought to be condemned in the plaintiff's petition, would amount to a sum almost incalculably

larger than the jurisdictional limit of the Circuit Court, and that the damages to the railroad from said condemnation would amount to a sum not less than $60,000.00. (M. p. 61.)

And most especially will this alleged rule of "nominal damages" not be applied in a case where, as in the case at bar, the defendant railroad, confident in the soundness of its position, and not relying alone upon the effect of the plaintiff's demurrer to its answer, asked, but was, at the instance of the Telegraph Company, refused permission to introduce evidence establishing the truth of the facts stated in its answer, of which an abstract has hereinabove been given.

In conclusion upon this branch of the argument, we con-fidently submit that, upon such a special state of the record as exists in this case, the alleged rule of "nominal damages" will never be applied by this honorable court; but by this, we would not be understood as in the least admitting that this court has ever laid it down (even as a rule of general application), that when a telegraph company condemns a right of way for its purposes upon the right of way of a railroad, the damages to the railroad are only "nominal." On the contrary we submit that no such rule has ever been announced by this honorable court.

CONDITION PRECEDENT.

Upon page 63 of his brief, under the general head of the Amount Involved in the Controversy, counsel for the defendant in error, says:

"But plaintiff in error asserts in answer 'that it will not be possible to construct or maintain a telegraph line upon its property, as set out in said petition' in such a manner as not to obstruct or hinder the usual travel upon defendant's said railroad.' In other words, by their answer and proof, if permitted to make it, they would thwart the express purpose and will of the Legislature."

The inference is utterly unjustifiable. The statute of North Carolina (if indeed any statute covering the premises is now in force—as to which, see the opening brief for the defendant in error, pages 20–52), does not confer upon telegraph companies the unqualified right to construct, maintain and operate lines of telegraph along the right of way of railroads,—but, at most, only confers that right, *provided* said telegraph lines do not obstruct or hinder the usual travel on such railroads; so that, in making the point that the line proposed to be erected upon the property of the defendant in error will obstruct or hinder the usual travel upon its railroad, the plaintiff in error merely proposes to claim the benefit of the express exception or proviso of the statute.

On pages 69, *et seq*, of his brief, counsel for the defendant in error insists that the limiting proviso of the statute exists only as a "condition subsequent;" but we submit that this very statement amounts to an admission of the soundness of our view. It is implied, not to say asserted, by the defendant in error, that the moment the telegraph line as constructed is found to be an interference with or obstruction of or hindrance to the operation of the railroad, it may be enjoined and should be removed. Surely then, if, as the plaintiff in error avers in its answer and offers to prove, the right of way of its railroad is in sundry places of such a character that the line cannot be constructed as proposed, without such interference, obstruction or hindrance to the railroad, then it is eminently proper to interpose this defense at the outset, and the court will never permit such construction; and thus the condition subsequent, even granting it to be such, has, by the answer and offered proof of the railway company, been transformed into a "condition precedent."

ERROR IN QUOTING STATUTE.

Near the top of page 72 of his brief, counsel for the defendant in error, we will presume inadvertently, misquotes the

North Carolina statute in a vital particular, reciting that the court "may" (instead of "shall") hear the proofs and allegations of the parties. No wonder that the counsel also contends that this provision is not applicable to the case of a railway company seeking to defend against the condemnation of its right of way by a telegraph company; his view being, as prominently appears throughout his brief, that a railroad company has no rights which a telegraph company is bound to respect, and therefore the court in this case should turn a a deaf ear to all the railway company may desire to advance in its defense.

TRIAL BY JURY.

(a) The Circuit Court had no power or authority to appoint commissioners to condemn the property of the Railway Compeny.

(b) "Congress has not itself provided any peculiar mode of trial in proceedings for the condemnation of land for public use," 160 U. S., p. 513, and the ascertainment of just compensation by Circuit Courts of the United States, in such cases, cannot be had except in a regular trial by an ordinary jury of the county.

(c) The orders of the Circuit Court and its clerk, mentioned in the assignments of error, are in violation of the Constitution of the United States and the acts of Congress governing in such cases.

We have already, in this closing brief, submitted the proposition that this entire procedure before the Clerk of the Circuit Court of the United States for the Western District of North Carolina was inapplicable, unauthorized and illegal; and in our assignments of error (see record, mar. pp. 28–29 and 131), we charged that the order dated October 24, 1898, which inaugurated these proceedings, was illegal and invalid, because said order—deprived your petitioner of its property without due process of law,—denied to it the equal protection of the laws,—

termined, without proof, conditions precedent to the condemtion of its property,—refused to hear the proofs of your titioner, as required by section 1945 of the Code of North arolina,—refused to permit it to introduce proof,—denied it opportunity to be heard in its defense,—determined, without proof, that the Telegraph Company might take possession , use and exercise dominion and control over, the property petitioner, for the purposes of said Telegraph Company, ithout the further order of court,—delegated to the Clerk of id Circuit Court the power of selecting and appointing commissioners,—authorized said clerk to preside over said commissioners, and delegated to said clerk powers vested in said ircuit Court of the United States and in said Circuit Court ly. To us, these propositions seem self-demonstrative and onclusive of the case.

The third section of the Judiciary Act of March 3, 1886, as orrected by act of August 13, 1888, substantially provides, in espect to a cause removed from a State court and properly ocketed in a Federal court, that—"the cause shall then proeed in the same manner as if it had been originally commenced the said Circuit Court."

When, therefore, the case at bar was removed from the uperior Court of Guilford county to the Circuit Court of the nited States for the Western District of North Carolina and proper transcript of the record duly filed in the latter court, his act of Congress required that proceedings thereafter in aid Circuit Court should be had as if the case "had been riginally commenced in the said Circuit Court."

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113 U. S., 726.

Subject: Procedure in Federal Court.

In *Ex Parte Fiske*, 113 U. S., 726, this court said:

"The petitioner having removed his case into the Circuit Court, has a right o have its future progress governed by the law of the latter court and not

by that of the court from which it was removed; and if one of the advantages of this removal was an escape from this examination, he has a right to that benefit if his case was rightfully removed."

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104 U. S., 44.

In *King* v. *Washington*, 104 U. S., 44, the court said:

"The Federal Court was bound to deal with the case according to the rules of practice and evidence prescribed by the act of Congress. If the case is properly removed, the party removing it is entitled to any advantage which the practice and jurisprudence of the Federal Court gives him."

We respectfully submit, in the light of these principles, that the Circuit Court had no power or authority to appoint commissioners to condemn the property of the Railway Company: that the case at bar is a suit at common law (*Kohl* v. *U. S.*, 91 U. S., 367); and that—if the property of the Railway Company was subject to condemnation—the ascertainment of just compensation could only be had in the Circuit Court by an ordinary jury of the county in a regular trial.

The Seventh Amendment to the Constitution of the United States provides as follows:

"ARTICLE VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Sections 648 and 649 of the Revised Statutes provide as follows:

"Sec. 648. The trial of issues of fact in the circuit courts shall be by jury except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section.

"Sec. 649. Issues of fact in civil causes in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in

g waiving a jury. The finding of the court upon the facts which may
ner general or special, shall have the same effect as the verdict of a

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2 Pet., 490.

Subject: Procedure in Federal Court. Trial by Jury.

Bank of Hamilton v. *The Lessee of Dudley*, 2 Peters, 490.
ourt, at p. 522, said:

'he plaintiffs in error contend that the court erred in over-
g the motion to appoint commissioners to value the im-
ements in pursuance of the occupant law of Ohio; and
ndering judgment without conforming to that law. The
section of the act provides that 'an occupying claimant,'
mstanced as was the plaintiff in error, 'shall not be evicted
rned out of possession, until he or she shall be fully paid
alue of all lasting and valuable improvements made by
occupying claimant,' 'previous to receiving actual notice
ne commencement of suit,' &c., 'unless such occupying
ant shall refuse to pay the person so setting up and prov-
n adverse and better title, the value of the land without
mprovements made thereon,' &c."

The 2nd section proceeds to direct the court to appoint
missioners to make the valuation, which had been pre-
ed by the preceding section.

The counsel for the defendant in error insists that this law
pugnant to the 10th section of the first article of the Con-
tion of the United States; and to the ordinance of 1787
he government of the northwestern territory.

This court does not think that these questions properly
in the present actual state of this controversy. The 7th
ndment to the Constitution of the United States declares
'in suits at common law, where the value in controversy
l exceed twenty dollars, the right of trial by jury shall be
erved.' This is a suit at common law, and the value in
roversy exceeds twenty dollars. The controversy is not

confined to the question of title. The compensation for improvements is an important part of it, and if that is to be determined at common law, it must be submitted to a jury.

"It has been said that the occupant law of Ohio must, in conformity with the 34th section of the Judicial Act, be regarded as a rule of decision in the courts of the United States.

"The laws of the States, and the occupant law, like others, would be so regarded independent of that special enactment; but the exception contained in that section must be regarded likewise. The law, so far as it consists with the Constitution of the United States and of the State of Ohio, is a rule of property, and of course a rule of decision in the courts of the United States; but that rule must be applied consistently with their constitution.

"Admitting that the legislature of Ohio can give an occupant claimant a right to the value of his improvements, and can authorize him to retain possession of the land he has improved, until he shall have received that value; and assuming that they may also annex conditions to the change of possession, which, so far as they are constitutional, must be respected in all courts; still that legislature cannot change radically the mode of proceeding prescribed for the courts of the United States; or direct those courts, in a trial at common law, to appoint commissioners for the decision of questions which a court of common law must submit to a jury."

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3 Pet., 432.

Subject: Procedure in Federal Court. Trial by Jury.

In *Parsons* v. *Bedford*, 3 Peters, 432, this court, in speaking of the Seventh Amendment to the Constitution of the United States, at p. 446, said:

"* * * In a just sense, the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar

which they may assume to settle legal rights. And Con- seems to have acted with reference to this exposition in Judiciary Act of 1879, Ch. 20 (which was contempora- s with the proposal of this amendment); for, in the ninth on, it is provided that 'The trial of issues in fact in the ct courts in all causes, except civil causes of admiralty maritime jurisdiction, shall be by jury'; and in the twelfth on, it is provided that 'the trial of issues in fact in the it courts shall in all suits, except those of equity and of ralty and maritime jurisdiction, be by jury'; and again, e thirteenth section, it is provided that 'the trial of issues ct in the Supreme Court in all actions at law against citi- of the United States shall be by jury.'"

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16 Otto, 408.

Subject: Procedure in Federal Court. Trial by Jury.

Hodges v. *Eastman*, 16 Otto, 408–413, Mr. Justice Harlan, king for this court, said:

* * * The record discloses that the defendants a determination, by the jury, of a part of the facts, while r facts, upon which the final judgment was rested, found by the court to have been conceded or not dis- d. If we should presume that there were no material facts idered by the court beyond those found in the answers to ial questions, then, as we have seen, the facts found do not orize the judgment. If, on the other hand, we should ad- e it to have been defendant's duty to preserve the evidence bill of exceptions, and that, in deference to the decisions he state court, it should be presumed that the 'facts con- d or not disputed at the trial' were, in connection with facts ascertained by the jury, ample to support the judg- t, we then have a case, at law, which the jury was sworn y, determined, as to certain material facts, by the court e. without a waiver of jury trial as to such facts. It was

the province of the jury to pass upon the issues of fact, and it was the right of the defendants, secured by the Constitution of the United States, to have them do so. That right could have been waived, but it could not be taken from them by the court. If, upon the trial, all the facts essential to recovery had been undisputed, or so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a peremptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court. The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and itself determine the remainder, without a waiver by the defendants of a verdict by the jury. In civil cases, other than those in equity and admiralty and except where it is otherwise provided in bankruptcy proceedings, 'the trial of issues of fact'—that is, of all the material issues of fact—'in the circuit courts shall be by jury,' unless the parties, or their attorneys of record, stipulate in writing for the waiver of a jury. R. S. secs. 648, 649. There is no such stipulation in this case, and there is nothing in the record from which such stipulation or waiver may be inferred. It has been often said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver. For these reasons, the judgment below must be reversed."

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113 U. S., 316.

Subject: Procedure in Federal Court. Trial by Jury.

In *Baylis* v. *Travellers' Insurance Co.*, 113 U. S., 316, this court, at page 321, said:

"The right of trial by jury in the courts of the United States is expressly secured by the Seventh Article of Amendment to the Constitution, and Congress has, by statute, provided for the trial of issues of fact in civil cases

urt without the intervention of a jury, only when the parties waive t to a jury by a stipulation in writing. Rev. Stat., Secs. 648, 649.

constitutional right this court has always guarded with jealousy. *Grymes*, 1 Pet., 469; *DeWolf* v. *Rabaud*, 1 Pet., 476; *Castle* v. *Bullow.*, 172; *Hodges* v. *Easton*, 106 U. S., 408."

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148 U. S., 327.

Subject: Trial by Jury.

Monongahela Navigation Company v. *United States*, 148 U. Mr. Justice Brewer, speaking for the court, said (p. at—

arles River Bridge v. *Warren Bridge*, 11 Pet., 420, 571, Mr. Justice in his opinion, referring to a provision for compensation found in er of the Warren bridge, uses this language: 'They (the legislavide that the new company shall pay annually to the college, in the old one, one hundred pounds. By this provision it appears legislature has undertaken to do what a jury of the country only nstitutionally do: assess the amount of compensation to which lainants are entitled.' "

ed, the only plausible ground for setting afoot such aralled procedure in a court of the United States as d in the case at bar, is to be found in section 914 of vised Statutes, which provides that:

14. The practice, pleadings and forms and modes of proceeding in es, other than equity and admiralty causes, in the circuit and dists, shall conform, as near as may be, to the practice, pleadings and l modes of proceeding existing at the time in like causes in the record of the State within which such Circuit or district courts any rule of court to the contrary notwithstanding."

s held, however, in the case of *Luxton* v. *North River Co.*, 147 U. S., 338, that this "direction," of conformity tate practice and procedure, must "give way, whenever, t the State practice would be inconsistent with the defeat the purpose, or impair the effect of any legislacongress."

In *Southern Pacific Railroad* v. *Denton*, 146 U. S., 208, this ourt, in commenting upon section 914, of the Revised Statutes, said;

"In one of the earliest cases that arose under this act, this ourt said: 'The conformity is required to be 'as near as may e'—not as near as may be possible, or as near as may be racticable. This indefiniteness may have been suggested by purpose: it devolved upon the judges to be affected the duty f construing and deciding, and gave them the power to reect, as Congress doubtless expected they would do, any subrdinate provision in such State statutes, which, in their dgment, would unwisely encumber the administration of he law, or tend to defeat the ends of justice, in their tribunals.' *ndianapolis & St. Louis Railroad* v. *Horst*, 93 U. S., 291, 300, 01."

The sections of the Code of North Carolina providing for he assessment of damages in a condemnation proceeding by hree commissioners to be appointed by the court are in direct onflict with section 648 of the Revised Statutes, and we subnit that they must give way to this act of congress because to dopt the state practice would be inconsistent with the terms, efeat the purpose and impair the effect of legislation of conress. It seems to be plain that after the case at bar had been roperly removed to and was pending upon the docket of the ircuit Court of the United States that proceedings in the latr court should have been governed by section 648, if the roperty of the railway company was subject to condemnation.

This would appear to be sufficiently clear from the authories above cited, but a yet more cogent and conclusive authority to be found in *Chapell* v. *United States*, 160 U. S., 499. In this ase, land for a lighthouse was condemned by the United States, n a proceeding in the District Court of the United States for the District of Maryland, under an act of Congress of August 1, 888, and the objection was taken that the proceeding should ave been in the appropriate court of the State of Maryland, and

g to the practice in the courts of that State, within
e land lay; especially, as the said State of Maryland had
pecial statute providing for just such condemnations by
ed States, and the act of Congress in the premises
l next to no direct provisions regulating the course of
e, but, on the contrary, expressly required, almost in
words of said section 914, that:

> The practice, pleadings, forms and modes of proceeding, in
> ing under the provisions of this act, shall conform, as near as may
> practice, pleadings, forms and proceedings existing at the time in
> in the courts of record of the State within which such Circuit
> Courts are held, any rule of the court to the contrary notwith-

aryland statute provided that the petition be verified
by agent of the United States specially appointed
urpose, and the damages assessed by a sheriff's jury
summoned therefor; but the proceeding was actually
the name of the Secretary of the Treasury, as pro-
the act of Congress aforesaid, and the damages were
by an ordinary jury at the bar of the court. Both
artures from the State practice were made the ground
objection, but this court held that:

provision of the Maryland statute, that a petition in
ty court shall be verified by affidavit of the agent of
ed States, is inapplicable to a petition presented to a
the United States by the officer designated in the act
ess. And the provision requiring a sheriff's jury to
writing, and to return to the clerk of the court, the
y taken before them, has no application to a trial had
ence taken before the court itself.

proceeding, instituted and concluded in a court of
ed States, was, in substance and effect, an action at
hl v. *United States*, 91 U. S., 367, 376; *Upshur County*
135 U. S., 467, 476. The general rule as expressed
evised Statutes of the United States, is that the trial
of fact in actions at law, both in the District Court

and in the Circuit Court, 'shall be by jury,' by which is evidently meant a trial by an ordinary jury at the bar of the court. Rev. Stat., Secs. 566, 648. Congress has not itself provided any peculiar mode of trial in proceedings for the condemnation of land for public uses. The direction in the act of 1888, c. 728, sec. 2, that such proceedings shall conform 'as near as may be' to those 'in the courts of record of the State,' is not to be construed as creating an exception to the general rule of trial by an ordinary jury in a court of record, and as requiring, by way either of preliminary, or of substitute, a trial by a different jury, not in a court of record, nor in the presence of any judge. Such a construction would unnecessarily and unwisely encumber the administration of justice in the courts of the United States. * * * * *"
160 U. S., 513–14.

In the case at bar great questions have been passed upon by the court; and by its orders vital rights of one of the litigants have been so far settled that, without further order of the court, the possession of his property will pass to the opposite party, who may at once enter and build thereupon his own structures—without the ascertainment of just compensation in the mode prescribed by Congress, indeed, in direct violation of acts of Congress, in violation of the constitutional rights of the suffering party, and without due process of law.

Indeed, in the light of the above discussion, we submit that the action of the Circuit Court would have been not one whit more clearly unauthorized, unwarranted and illegal, if its order had been that an irresponsible party should fix the compensation due to the plaintiff in error, and that the defendant in error, upon paying into court the compensation thus fixed, should have the right to take possession of and control over the property of the railroad, erect its structures thereupon,

and use it so far as necessary for its own purposes, without the further order of the court.

It would seem futile to query whether or not such an order is appealable. If not, then the vital rights of the citizen are at the mercy of the subordinate courts of the country and he is required to submit to illegal, unspeakable and irremedial wrong and outrage, while the doors of this, the highest tribunal in the land, are closed against him.

If, as was said in the case of *Luxton* v. *North River Bridge Co.*, 147 U. S., 338, the final or appealable character of an order is determined by its legal effect, then there could scarcely be presented to this court a clearer or stronger case of an appealable order.

Effect of Amendment of North Carolina Code.

We come now to the effect of the amendment of the sections of the North Carolina Code under which these proceedings were brought, a discussion of which will be found at pages 87–89 of the reply brief for the defendant in error; but, before really considering the legal construction and effect of this amendment, or rather of these amendments, we desire to call attention to their obvious origin and history.

The most cursory glance at the specific amendments, as said amendments are set forth in the brief of counsel, and at the objections taken for the railroad in the course of these proceedings, as said objections appear upon the face of the record, will demonstrate that the amendments were framed with the special view of nullifying or avoiding the effect of the objections, and framed by some one possessing the most detailed and familiar knowledge of the case at bar. It goes without saying who the framer of these amendments was.

But it is unnecessary to demonstrate by argument what is in effect, substantially admitted. Upon page 88 of said reply brief of defendant in error will be found this paragraph:

"Thus it will be seen that the legislature of North Carolina, cognizable no doubt of the technical pleas entered by this plaintiff in error in this proceeding, so contrary to the policy of the state, made the above amendment, which effectually eliminates every single objection made by the plaintiff in error to the procedure on the part of the defendant in error."

True, counsel for defendant in error adds—"I do not deem that the amendment was necessary in order to maintain this proceeding;" but he cannot hope to escape the effect of the confession of weakness involved in this amendment of a statute affecting a controversy actually pending in the courts, or the obvious inference that he considered his cause hopeless, or at best exceedingly doubtful, under the law as it stood prior to this amendment.

Coming now more strictly to the question whether and to what extent said amendments may be considered to bear upon and affect the case at bar, *as it now stands in this court*, we submit that counsel has misapprehended the law applicable to this question. The Code of North Carolina, in its chapter entitled "Statutes, Repeal and Construction of," (see Code of North Carolina, Vol. 2, Chap. 59), contains this section:

"Sec. 3766. How parts of acts amended to be considered. 1868–'9, c. 270, s. 22. 1870–'1, c. 111.

"Where a part of a statute is amended it is not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment."

This section forces upon us this question. If the new provisions are to be considered as having been enacted at the time of the amendment, to what extent, if at all, are such "new provisions" to be considered as affecting pending causes? The counsel for the defendant in error quotes several authorities for the position that, when a statute deals with procedure alone, it may be considered to have retrospective force, *i. e.*, *prima facie*, it applies to all actions, those which have accrued

or are pending, as well as to future actions. We do not care to discuss this proposition; but *how* is such a statute to be applied to pending actions?

Is it, in theory, to be carried back into the past, and applied to what has been done under the old law, from the inception of the cause? One of the authorities quoted by counsel for the defendant in error, to-wit: *Sutherland on Statutory Construction*, sec. 482, gives a definite answer to this question. The quotation as found on pages 88–89 of his brief, is as follows:

"No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a new statute deals with procedure alone, *prima facie*, it applies to all actions—those which have accrued or are pending and future actions. If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings."

"From that time" be it observed.

There had been *steps already taken* in the cause, prior to the amendment of the statute. By which law are these steps to be tested? *The status of the case, as to the court in which it was commenced*, was, that it was commenced in the court of one county only, for the condemnation of a continuous right of way extending through many counties—a proceeding which the old law did not allow. Does the new law validate this unauthorized proceeding? There had been *pleadings put in* which were imperfect and defective under the old law, because of the lack of maps, surveys, etc. Will these also be validated by the new law? Conceding, for the sake of argument, that the new law has its application to this *pending case;* yet, does it effect, can it consistently be applied to, *past* as well as *future proceedings* therein?

These questions are every one of them answered by the learned text writer quoted as above, upon this subject, by counsel for the defendant in error, in the very section referred to, and in immediate sequence to the very words quoted by said counsel. Immediately following the words quoted by counsel

for the defendant in error, in this same section 482, the same writer, Sutherland, says:

"But the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law, will stand, unless an intention to the contrary is plainly manifested; and pending cases are only affected by general words as to future proceedings from the point reached when the new law intervened. * * "

Comment is unnecessary, except to remark that the position announced in the quotation just made would seem to be thoroughly in consonance with sound reason and common sense. So much with regard to the law governing the application of these amendments generally. We desire now to call special attention to the character of one of these amendments.

Amendment of the Law Affecting Measure of Compensation.

In words this amendment is as follows:

"Sec. 4. That section 2012 of said chapter 49 be further amended as follows: By inserting between the words 'chapter' and 'for,' in line 10 of said section, the following: "or any amendments thereto.'" (See brief of counsel for Telegraph Company, pages 87–88).

In order that the force and meaning of the law as amended may be more readily apprehended, we here quote section 2012, with the changes introduced by the amendment printed in italics:

"Sec. 2012. Proceedings for condemnation, appointment of commissioners, their report, exceptions thereto; appeal, final judgment, &c., to be as provided in this chapter in condemning, &c., for railroads.

"The proceedings for the condemnation of lands, or any easement, or interest therein, for the use of telegraph companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in this chapter *or any amendments thereto* for condemning lands to the use of railroads."

The force and meaning of this amendment would seem to be as follows: that whereas the Code of North Carolina of 1883 applied one measure of compensation, in the condemnation of rights of way for telegraph companies, and the new law applies a radically different measure, and whereas, under s. 2012 as it stood in the Code, the proceeding could only be had in accordance with the Code provisions—it is now provided by the amendment that, in cases of such condemnation, the compensation for the right of way taken may be measured and awarded, indifferently, under the old law as it stood in the Code, or the new law as enacted in the amendment.

We do not see how we can be mistaken as to this being the proper construction of the amendment, as it certainly is its purpose; and if we are correct in this view, then we submit that the law as amended is clearly *unconstitutional* and *void*.

That, commissioners should have the right, to-day, to award to a railroad company, whose right of way is condemned for the use of a telegraph company, compensation or damages calculated upon one basis, and to-morrow, or say six months hence, in a like proceeding, under like conditions, to acquire like telegraph rights, by the same telegraph company against the same railroad system, to award compensation fixed upon a radically different basis—is certainly not our idea of "the equal protection of the laws," or of that unvarying and impartial justice, which a settled legal system is designed to secure to every citizen and which is the indispensable basis of modern civilization.

This statute, in its amended form, goes even beyond the illustration given. Under its provisions, the same telegraph company might, on the same day, institute condemnation proceedings in the same court, against two different railroads, traversing the same section of the country, running parallel with each other, similarly situated, and holding their property under like conditions, and, on the same day, separate orders might be entered in each case appointing commissioners to fix

the amount of compensation, who could proceed upon radically different principles; that is to say, the commissioners in one case might proceed under the statute as it stood in the Code of 1883, and the other set of commissioners might proceed under the law as amended by the act of 1891, Chap. 160 of the public laws of North Carolina.

If the measure of compensation may be fixed, indifferently, under the Code of 1883, or the amendment of section 1946, which was enacted in 1891, prescribing a radically different measure of compensation, then the question arises: Who shall determine the law under which the condemnation shall be had? Is that power vested in the condemning corporation? or in the court? or in the commissioners? If the power of electing between these radically different laws is vested in the condemning corporation, it is an unfettered power which cannot be regulated by the courts. If on the other hand, such election can be made by the court, what are the rules and principles by which the court shall be governed in determining whether it will proceed under the old statute or the radically different new statute? and, may the court, on the same day, under substantially the same conditions, proceed in different ways.

It may be contended that the words "or any amendment thereto" should be read "and any amendment thereto;" that is to say, that the court must proceed under the old law except so far as amended, and that, where amended, the court must proceed under the new law. Let us see how this would operate, The Circuit Court in its orders of September 15, 1898, and October 24, 1898, prohibited commissioners from "extending their inquiry as to the benefit to be derived by the telegraph company or the value thereof to it" (record, marginal p. 43), that is to say, this order prohibited the commissioners from considering the value of the property of the railway company for telegraph purposes, even though it should appear that said property was naturally and peculiarly adapted to and in demand at that time for telegraph purposes; while

egislative amendment of 1891, made applicable by the
ıt statute, if the word " or " shall be read " and," requires
ommissioners to consider this element of value. Stated
her words, if the word " or " must be read " and " in this
ection, then and in that event the mode of proceeding
ted by the recent amendment, is in direct opposition to
anguage of the order of September 15, 1898.
ıder these circumstances, how are the commissioners to act?
they to obey the order of the court and disregard the new
te, or are they to disregard the order and obey the new
te? The two are irreconcilable. The commissioners cannot
eed under the order, without disregarding the statute which
lefendant in error says is now applicable, and they cannot
eed as directed by the new statute, without a palpable and
ıtional violation of the order instructing them how to
eed.

Brief Summary of Argument.

'e cannot submit this brief, without an apology to the
t for its ragged and disjointed character; but beg leave to
, in explanation, to the fact that, it is in answer to a reply
f, for the defendant in error, which departs freely from the
inal order of the discussion and fails to notice some of
most important positions assumed in our opening argu-
ıts.
ı brief summary of the argument for the plaintiff in error,
submit:

As to the right and authority to condemn.

here was no law in existence, at the date either of the in-
ion of these proceedings or of the entry of the order ap-
ıting commissioners, under which a telegraph company
ht, in North Carolina, condemn a right of way for its pur-
es upon the strip of land constituting the roadway of a

railroad:—this, because, under the legislation of that State, a telegraph company had no right to proceed under the amended law of Eminent Domain, and said amended law had repealed the old law as it existed in the Code prior to amendment; which old law, but for its repeal, would have regulated Eminent Domain proceedings by telegraph companies.

2. As to remedy and procedure.

Even conceding, for argument's sake, that there was at the time in existence, in North Carolina, a statute applicable in the courts of that State to Eminent Domain proceedings by telegraph companies; yet the construction, by this honorable court, of the two apparently conflicting statutory provisions that proceedings on the common law side of the courts of the United States shall conform as nearly as may be to the practice and proceedings in the courts of the States, and that, cases removed from State to Federal courts shall proceed in the latter as if originally brought therein—clearly indicates that the North Carolina practice, providing for the assessment of damages or award of compensation, in Eminent Domain cases, *by commissioners*, had no application in the Circuit Court of the United States: because, to adopt said practice would be inconsistent with the terms, defeat the purpose, and impair the effect of the legislation of Congress, particularly with regard to the right of *trial by jury*, in cases at common law.

3. Even if legislation of North Carolina, regulating the exercise of the right of Eminent Domain by telegraph companies, had been in existence from the inception of these proceedings, and had also been applicable and effective in the Circuit Court of the United States; yet, neither the orders of that court in the premises, purporting to follow the course mapped out by said legislation, nor the acts and orders of the clerk thereof, purporting to carry into effect said orders of said Circuit Court, were in conformity with the provisions of said

Domain legislation of North Carolina; but, on the , were inconsistent therewith and violative thereof, as lly and in detail set out in the several briefs filed for ntiff in error—and, in particular,

d Circuit Court of the United States for the Western of North Carolina, by its order of October 24, 1898, ned that the entire condemnation of defendant's prop- ght be had in one county and in one proceeding, upon of land extending through twelve counties, much of held by the railroad, *in fee simple.*

id court, by said order, also determined, upon demurrer dant's answer, that the existence of the very condition truction or hindrance to the usual travel " on its road, by he right to condemn is expressly limited or excluded Eminent Domain statute of North Carolina, constituted nse against the proceeding, and refused to allow the nt to prove the special character of its right of way would demonstrate that such obstruction and hindrance evitably follow the erection of the proposed telegraph reupon.

id court, by said order, also delegated to its clerk the of selecting and appointing commissioners to assess the s, and authorized said clerk to preside over the meetings commissioners, which the said clerk, as shown by the actually did.

great respect, we submit that the entire case, as it ap- pon the face of the record, is a legal, or rather illegal, y. Both the law and practice obtaining in the courts th Carolina, in Eminent Domain cases, and the law and e obtaining in the courts of the United States, have nvoked, but neither system has been consistently fol- so that the plaintiff in error has been without the equal ion of the laws, and its property has been taken from

it without due process of law: wherefore it has appealed to this honorable court, which alone has jurisdiction and power to right the great wrong it has suffered in the premises.

Respectfully submitted,

ROBERT STILES,

ADDISON L. HOLLADAY,

Of Counsel for Plaintiff in Error.